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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 927

JACK E. FORE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Fifth Circuit, [redacted]

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PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice And The Associate Justices Of The Supreme Court Of The United States Of America:

Your Petitioner, Jack E. Fore, respectfully prays and petitions that a Writ of Certiorari be issued out of, and under the Seal of the Supreme Court of the United States of America, to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on the 4th day of December, 1964, which judgment affirmed a judgment of the United States District Court for the Eastern District of Texas, in which judgment the District

Court adjudged, in a cause involving Federal Taxation, that the tax lien of the United States of America was superior to the rights of Jack E. Fore, Petitioner, a judgment creditor, in and to the proceeds of the sale of personal property (a herd of cattle) which was the subject of the litigation.

JURISDICTION

Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by Title 28 U.S.C. § 1254(1). The opinion and judgment of the Court of Appeals for the Fifth Circuit was filed December 4, 1964. Motion for re-hearing was filed in the United States Court of Appeals for the Fifth Circuit on the 21st day of December, 1964, within the time required by the Rules of said Court, and overruled on the 21st day of January, 1965.

An Order was entered by the United States Court of Appeals for the Fifth Circuit, staying the mandate, provided that the Court had been furnished the Certificate of the Clerk of the Supreme Court of the United States, that a petition for Certiorari, and the record, had been filed in the Supreme Court of the United States of America to review the decision and judgment of the said Court by February 27, 1965. This Order has been complied with.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Texas is unreported, but the opinion of the District Court is printed as Appendix "A" to this petition.

The opinion of the Court of Appeals appears in 339 F.2d 70, and is also found in the record (R 64), and as Appendix "B" in this Petition.

QUESTIONS PRESENTED

This petition presents a single question of law which is apparent in the opinion of the Court of Appeals. The question is as follows:

> "Must Jack E. Fore, a 'judgment creditor' within the meaning of 26 U.S.C. § 6323 (§ 3672 of the Internal Revenue Code), be a 'judgment *lien* creditor', when personal property is involved, in order to have right of priority over a tax lien of the United States of America, which was filed subsequent to the date of the rendition of the judgment of Jack E. Fore by a Court of Record?"

STATUTE INVOLVED

The Statute involved is the tax priority statute of the United States of America, which is 26 U.S.C. §6323 (§ 3672 of the Internal Revenue Code), which we quote as follows:

> "Such lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed by the collector:
>
> "(1) Under State or Territorial Laws. — In the Office in which the filing of such notice is authorized by the law of the state or territory in which the property subject to the lien is situated, whenever the State or territory has by law authorized the filing of such notice in an office within the State or territory; or . . ."

The pertinent Statute of the State of Texas authorizing the filing of said notice is Art. 6644, Revised Civil Statutes, of Texas, Appendix "C" to this Petition.

REASONS RELIED ON FOR GRANTING OF WRIT

1. The Court of Appeals has decided an important question of Federal Law which has not been, but which should be, settled by this Court.

This reason is pointed up very clearly in the annotations in the case of *United States v. Ball Construction Company*, 336 U.S. 934, 78 S.Ct. 442, 2 L.Ed.2d 510, Annotations at page 1855, in which the annotator of this decision stated the following:

> "*Necessity of judgment lien.* Whether, to be a 'judgment creditor' within the meaning of the statute, the owner of a judgment must be a judgment lien creditor is a question which has not yet been passed upon by the Supreme Court of the United States."

2. The Judgment and decision of the Court of Appeals for the Fifth Circuit has decided a Federal question of law in a way in conflict with applicable decisions of this Court.

This Court in the case of *United States v. Gilbert Associates*, 345 U.S. 361, 97 L.Ed. 1071, 73 S.Ct. 701, has stated that the words "Judgment creditor" in § 3672 of the Internal Revenue Code should be interpreted in "the usual, conventional sense of a judgment of a Court of Record."

This Court then has thus defined the meaning of the words "judgment creditor" in connection with the interpretation of the Statute as being the owner of a "Judgment of a Court of Record;" but has also stated that the rule of construction applied to this Statute should be that the words "judgment creditor" should be given "their usual, conventional meaning."

This Court has thus already settled the question, and the rule of statutory construction has been applied by stating that the words in this Statute must be given their "usual and conventional meaning."

The Court has then stated that the "usual and conventional meaning" means "any judgment of a Court of Record, since all states have such courts."

Therefore, the question has been settled by this Court by defining the term "judgment creditor," and by determining the applicable rule of construction which it has chosen to apply. The same rule of construction should apply when it protects the individual, in the same manner that it applies, when it protects the Government.

Therefore, the Court of Appeals for the Fifth Circuit has decided a Federal question of law which is in conflict with the applicable decision of this Court in *United States v. Gilbert Associates, Inc.*, supra.

The concurring opinion of Justice Jackson, in *United States v. Security Trust & Savings Bank*, 340 U.S. 47, 95 L.Ed. 53 (57); 71 S.Ct. 111 concurs in the same rule of the construction of this Statute wherein it is stated:

> "The *history* of this tax lien statute indicates that only a Judgment creditor in the *conventional sense* is pro[illegible]ed." (Emphasis added).

STATEMENT OF THE CASE

The statement of facts in this case will not be lengthy. The appropriate facts are few. The issue is easily defined from a standpoint of fact and of law.

The property involved in this case was a herd of cattle. All of the fact findings necessary for the determination of this petition are found in the opinion of the United States Court of Appeals. We may disregard all of the original parties to the suit and all of the proceedings in the trial court, since only the parties to this appeal are involved in this proceeding now.

After a Receiver had been appointed to sell the cattle, and all claims, including the claims of Jack E. Fore and the Government had been filed therein, and after the claims of the laborers' lien and the chattel mortgage lien. by the judgment of the Court and the subsequent agreement of the parties had been paid by the Receiver, there remained in the hands of the Receiver approximately $15,000.00. The exact amount is unimportant.

The decision before the Trial Court and the Court of Appeals, and this Court, is whether or not Jack E. Fore, the Petitioner, or United States of America, is entitled to this fund.

The claim of Jack E. Fore was based on a personal judgment rendered on October 26, 1962, in the District Court of Harris County, Texas, which is a Court of Record, against Sunset Drilling Company, the taxpayer, in the sum of $44,495.00. Under the law of Texas, execution could not issue on this judgment until 20 days thereafter. It was later issued for seizure of the cattle. The Receivership ensued and the Judgment claim was filed in the receivership. An Abstract of Judgment was filed in the Office of the County Clerk of Harrison County, Texas, on November 10, 1962, but under the law of Texas the filing of an Abstract of Judgment does not constitute a lien upon personal property. The filing of such an abstract

constitutes a lien upon real property only. No lien against the cattle or the proceeds from sale of the cattle in the hands of the Receiver is claimed by Jack E. Fore, Petitioner. Jack E. Fore, Petitioner, insists that the Federal Statute, Title 28 U.S.C. § 1254(1) is written as a *priority* statute *and not as a lien priority statute.* It was originally enacted in 1913, and has not been amended since.

The United States of America made assessments totaling $30,921.92, and filed notice of its lien in Harrison County, Texas, on November 15, 1962, and a second notice based upon different and additional assessments on February 19, 1963. These tax liens were filed after Jack E. Fore had become a "judgment creditor" of Sunset Drilling Company, but before execution was levied upon the cattle under the Fore judgment.

The question then before the Court, which has never been decided by this Court, is whether or not Section 3672 of the Internal Revenue Code (26 U.S.C. Sec. 6323) is a *lien priority* statute, or a statute defining *priorities* between holders of equitable and legal conflicting claimants.

If the words "judgment creditor" shall be interpreted as meaning "judgment *lien* creditor" then the United States of America should prevail.

If, however, as the Supreme Court of the United States has held in *United States v. Gilbert Associates*, 345 U.S. 361, 97 L.Ed 1071, 73 S.Ct. 701, the words "judgment creditor" should be interpreted in their usual and conventional sense of a "judgment of a Court of Record," then the Statute should be interpreted as a *priority* statute and not as a *lien* statute as indicated by the title of the said Act, which is:

"Validity against mortgagees, pledgees, purchasers and judgment creditors"

and the rights of Jack E. Fore as a prior "judgment creditor" should have priority over the Federal Tax Lien.

The interpretation of the words "judgment creditor" as meaning a "judgment lien creditor" cannot possibly be in accord with the judgment of the Supreme Court of the United States in the case of *United States v. Gilbert Associates,* which clearly states that the words "judgment creditor" shall be interpreted in their "usual, conventional sense," which mean "a judgment of a Court of Record."

Therefore, the decision of the Court of Appeals, under Rule 29 of the Rules of this Court, has decided an important question of Federal law, which has not yet been, but should be settled by this Court; and what is more, the decision of the Court of Appeals is in direct conflict with the decision of this Court in *United States v. Gilbert Associates*, supra. Both decisions cannot possibly stand together, and these two decisions announce a conflicting statement as to (1) the definition of a "judgment creditor"; and (2) as to the proper rule of construction to be applied in the interpretation of the words "judgment creditor," since the United States Supreme Court has chosen the rule of construction that these words shall be construed in "the usual, conventional sense of a judgment of a Court of Record."

ARGUMENT AND AUTHORITIES UNDER REASONS FOR GRANTING THE WRIT

We have already made our substantial argument by pointing out the conflict in this decision, which blindly follows the decision of the Ninth Circuit in *Miller v. Bank of*

America, 166 F.2d 415 (9th Cir. 1948), and other decisions of the District Courts, all of which follows *Miller v. Bank of America.*

We respectfully request this Court to carefully examine *Miller v. Bank of America*, 166 F.2d 415, upon which all subsequent decisions of the Courts of Appeal and District Courts are based, because the reasoning behind this decision is basically unsound.

We point out to the Court that prior to the enactment of §3672(a) of the Internal Revenue Code, 26 U.S.C.A. 6323, there were no priorities or equitable rights over a government tax lien of any kind or nature whatsoever. Prior to the enactment of this section of the Statute, which is in the same and identical language in which it was enacted in 1913, the Government Tax Lien was superior to all other claims and equities of other parties, even a prior lien creditor, an innocent purchaser, or any legal or equitable claims of any person whomsoever. It was prior to mortgagees, pledgees, purchasers and judgment creditors.

The inequity of this situation was apparent. The 1913 Amendment changed all of this and recognized the reasonable equities of third parties, and passed this Statute, which is entitled:

> "Validity against mortgagees, pledgees, purchasers, and judgment creditors."

It is apparent, therefore, that the Statute which was enacted in 1913, and which has stood in its original language since 1913, was enacted as a *priority statute and not as a lien statute.* As for example, an innocent purchaser is protected without being a lien creditor. We insist that "judgment creditors" were given priority, even though they may

not have had a lien, and that a judgment creditor was intended at that time as being a "judgment creditor" in the usual, conventional sense of a "judgment of a Court of Record."

We bear in mind that in 1913 the philosophy of taxation was considerably different, and much more conservative than at the present date. At that time there was no income tax, no estate tax, no luxury excise tax, and many other taxes that have come into existence since that date.

But we again point out that this Statute, enacted in 1913, was a conscionable remedial statute intended to relieve the harshness and the injustice of the priority given Federal tax liens, over all equitable rights, even over the claims of a prior lien creditor, or even an innocent purchaser.

This points up then the complete unreasonableness of the basis of the decision in *Miller v. United States* (9th Cir.) 166 F.2d 415 (1948).

We quote the fallacious reasoning behind this decision, as follows:

> "The appellant now contends that a 'judgment creditor' within the meaning of Sec. 3672(a) of the Internal Revenue Code, 26 U.S.C.A. Int. Rev. Code, §3672(a), requires nothing more than the rendition and entry of a judgment."
>
> "While the interpretation of the statute insisted upon by Appellant probably would not have absurd or shocking results, it would clearly defeat the object intended by Congress. Moreover, it would be unreasonable to conclude that the Government intended to place itself at a disadvantage in procuring a tax lien when the decisions of the courts and the very history of the legislation in question show that before

> the enactment of the above statutes no lien whatsoever existed in favor of any class or classes of creditors."

The history of the Statute prior to 1913 is discussed in *Mackenzie v. United States*, 109 F.2d 540 (1940—9th Cir).

The Court stated, as grounds for its decision, that it could not believe that Congress intended to place the Government at the disadvantage of having to perfect and file a tax lien, when such was not necessary prior to the enactment of the remedial statute. However, *that was exactly the purpose of the enactment of the statute.* If this reasoning is sound reasoning, then the same reasoning could be applied to innocent purchasers, and these priorities should also be disregarded, because in the enactment of the Statute of 1913, the Government placed itself at the disadvantage of perfecting and filing tax liens as against such claims, when this was not necessary prior to the enactment of the Statute of 1913. (Sec. 3672(a) of the Internal Revenue Code, 26 U.S.C.A. Sec. 6323).

Therefore, it is obvious that this Court cannot subscribe to this fallacious and unreasonable interpretation of the Statute. All decisions supporting the Government are based upon *Miller v. United States*, supra.

The question before this Court has been decided adversely to the Government, by the Supreme Court of the United States of America in the case of *United States v. Gilbert Associates*, supra.

RULES OF CONSTRUCTION OF THE STATUTE

We respectfully submit that every rule of Statutory construction favors the position of the Petitioner in this case.

These rules are as follows:

(1) Words in a statute must be given their "usual and conventional" meaning.

United States v. Gilbert Associates, 345 U.S. 361, 97 L.Ed. 1071, 73 S.Ct. 701;

(2) Remedial statutes should be literally construed to give effect to the purpose intended to be accomplished.

United States v. Naniaci, 36 F. Sup. 293 (Affirmed, 116 F.2d 935);

United States v. City of Detroit, 141 F.2d 1021;

(3) Revenue laws should be construed against the taxing authority, and in favor of the taxpayer.

Statutes, 82 C.J.S. Par. 396, p. 948, 952;

DeLaney v. City and County of Denver, 185 F.2d 246 (253), (10th Cir., 1950);

Vaughan v. Warner, 157 F.2d (1946-3rd Cir.);

Dart Truck Company v. United States of America, 159 F. Sup. 303 (Western Dist. of Mo. - 1958).

Hecht v. Malley, 265 U.S. 144, 44 S.Ct. 462, 68 L.Ed. 949.

(4) Courts will not rewrite statutes, or supply omissions, mistakes or oversights of the legislative branch, or indulge in judicial legislation.

Statutes, 82 C.J.S. Sec. 328, Page 635.

Shoppers World Inc. v. State of Texas, 373 S.W.2d, 1963, (Tex.Civ.Ap.) affirmed by Sup. Ct. of Texas at 380 S.W.2d 107.

When the language of a Statute is plain, and when the words are used in their usual and ordinary meaning, a Court should not eliminate or supply a word upon the supposition that it was included or omitted by inadvertence.

We respectfully urge that it is not the function of this Court, or any other Court, to correct legislative errors, mistakes or omissions. We urge that a Court should not, by judicial construction, alter or enlarge the language of a statute, in order to give the statute a meaning which was clearly not intended or included within the language of the statute. It is true that the Courts will not be so bound by the letter of the Statute that they will assign a meaning to its words that would lead to an absurdity or injustice. On the other hand, the Courts should not be governed by an idea of expediency, and thus interpret a statute so that it will express a meaning which the Court feels the legislature *should have expressed*, rather than a meaning as to what the *words actually provide*.

We submit that the rule of expediency is nothing more than the rule of discretion depending upon the temperament, personal thinking, and philosophy of the Judges who compose the Court. The test should be as to what the legislative body actually said, and not what it should have said.

We therefore urge that every reasonable rule of statutory construction supports the position of the Petitioner in this case.

But why argue about the rules of construction? This Court in *United States v. Gilbert Associates*, supra, has not only defined the words "judgment creditor" but has adopted

the rule of construction that the words would be given their "usual conventional" meaning.

It cannot possibly be true, that there is a double standard of statutory construction, so that the Government will always prevail. Shall the words "judgment creditor" be defined as a "judgment of a Court of Record" when helpful to the Government, but assigned a different meaning to the disadvantage of a taxpayer?

We therefore urge that the decision of the Court of Appeals is in direct conflict with the decision of this Court in *United States v. Gilbert Associates,* supra, and that this Court should take jurisdiction of this cause, and grant the Petitioner's Writ of Certiorari.

TREASURY REGULATIONS

It will be urged by the Government that the position of the Petitioner has been foreclosed against Petitioner by virtue of the Treasury Regulation adopted in 1954. This Treasury Regulation is set out in Exhibit E in the Appendix to the Brief.

This is a consideration which particularly deserves the attention of this Court, and this invasion of the Legislative and Judicial functions of the Government by this Administrative Agency (the Commissioner of Internal Revenue), is one of the most flagrant abuses of the administrative processes of record.

This extension of the Administrative Powers of an Executive Officer is something new in the realm of administrative law, and this Court should take jurisdiction of this case for the purpose of disapproving and rejecting the manner

in which the Commissioner has issued this regulation, in the face of the express refusal of Congress to include the regulation in the Revenue Act of 1954, and in view of the fact that it is in conflict with the decisions of this Court.

On April 6, 1953, the Supreme Court of the United States handed down the decision in *United States v. Gilbert Associates,* 345 U.S. 361, 97 L.Ed. 1071, 73 Sup. Ct. 701 (1953). This decision was handed down five years after the case of *Miller v. Bank of America,* 166 F.2d 415 (9th Cir. 1948). In *Gilbert Associates* the United States Supreme Court had announced the rule that:

> (1) The rule of construction would be that the words "judgment creditor" would be used in their usual and conventional meaning.
>
> (2) The definition of the words "Judgment creditor" in their usual and conventional sense was "a judgment of a Court of Record."
>
> (3) The cardinal principle of "Federal taxation" is uniformity.

This rule is no different from the rule which has been applied for many decades, which is to the effect that in the interpretation of statutes, the words used therein should be assigned their usual, ordinary and conventional meaning.

> *Crane v. Commissioner of Internal Revenue* (1946), 331 U.S. 1, 91 L.Ed. 1301 (1306);
>
> *Old Colony Railroad Company v. Commissioner of Internal Revenue,* 284 U.S. 552; 76 L.Ed. 484 (489) (1932);
>
> *Statutes,* 82 C.J.S. Par. 329, Page 639.

This was the state of the law on the subject when the matter came up before Congress in 1954. This was the then "existing law."

The Government relies upon the Treasury regulations on procedure and administration (1954 Code), Sec. 301-6323-1.

The Commissioner then stated, in the form of a regulation, that in substance the words "judgment creditor" as used in the Statute meant that the creditor must be a "judgment *lien* creditor." This regulation was adopted even though Congress had expressly refused to include such an interpretation in the Statute, and after the Treasury Department had specifically requested such a change.

In an Appendix to this Brief we have copied at length the following discussion of the Internal Revenue Code of 1954 as contained in the House Report (Appendix D) and in the Senate Report, (Appendix E). These Exhibits are as follows:

> Appendix D contains the House Report, which is substantially in the language incorporated in the Treasury Regulation.
>
> Appendix E contains the Senate Report. We will observe in the Senate Report that all of the language with regard to "judgment creditors" which had been inserted by the House in the Tax Bill for 1954, was eliminated by the Senate. The Senate entirely deleted Subsection C as reported by the House of Representatives, and stated, "the deletion of Subsection C will continue in effect the existing law."

As stated before, we submit that the "existing law" had already been established by the Supreme Court of the

United States on April 6, 1953, in the decision of *United States v. Gilbert Associates*, 345 U.S. 361, 97 L.Ed. 1071, 73 Sup. Ct. 701, in which the Court stated that the words were to be interpreted in their "usual, conventional sense of a judgment of a Court of Record."

As Exhibit F, we attach Treasury Regulations on Procedure and Administration (1954 Code).

We thus see that the Treasury Department by administrative action overrode Congressional action. Congress saw fit to delete the provisions from the Act, but the Treasury Department went right ahead and included it in its Regulations, even though it was against the express will of Congress. It would have been very easy at this point, for Congress to have inserted the words "judgment *lien* creditor" or "judgment *execution* creditor" in the Act, but it expressly declined to do so. The Administrative Department thus overrode the will of Congress.

Therefore, the Treasury Regulation is in direct conflict with the action of Congress on the subject.

Congress refused to incorporate this provision into the Revenue Act, but the Treasury Department proceeded to incorporate the provisions in the Regulations, in the very teeth of the refusal of Congress to do so, and in direct conflict with the decision of the Supreme Court of the United States in the case of *United States v. Gilbert Associates.*

It is one of the most flagrant attempts to seize administrative authority of record.

Treasury decisions which are in conflict with the Statute, or with the decisions of the Supreme Court, are invalid.

Fawcus Machine Company v. United States, 282 U.S. 375; 75 L.Ed. 397 (99), and the cases cited on Pages 43 and 44 of our original Brief.

We submit that this Treasury Regulation which attempts to create a regulation or rule which is out of harmony with the Statutes, and contrary to decisions of the Supreme Court is a nullity.

Congress, as reflected in the Report of the Senate Committee, stated that "the applicable rules have been developed under existing law by judicial construction, and your Committee deems it advisable *to continue to rely upon judicial interpretation of existing law instead of attempting to prescribe specific statutory rules.* The deletion of Subsection 3 will continue in effect the existing law."

Then the Treasury Department has attempted to oust the Courts of their judicial function of interpreting the law by judicial construction, after the Senate had told the Commissioner to keep hands off, and leave the matter to the Courts for construction.

The Government now contends that the Commissioner "beat the courts to the draw," and ousted the courts of their rights to judicially interpret the Statute, by having the Commissioner judicially interpret the Statute; thus attempting to preclude the jurisdiction of the Courts. The Commissioner has arrogantly assumed the jurisdiction of the Supreme Court, and judicially interpreted the Statute, and now insists that the Courts are bound by this administrative legislation and administrative judicial function.

This is an extension of the judicial process which should not be tolerated by this Honorable Court.

This is particularly true where the Supreme Court of the United States in *United States v. Gilbert Associates* had, more than a year prior to the enactment of the regulation, held that the words "judgment creditor" were to be used in their usual, ordinary and conventional sense of being a judgment of a Court of Record.

CONCLUSION AND PRAYER

WHEREFORE, it is respectfully submitted that there has been presented in this Application a proper occasion for the exercise of the supervisory power of the Supreme Court of the United States, and sufficient grounds for the granting by this Court of a Writ of Certiorari, and Petitioner prays that this Court will take jurisdiction and correct the errors of the Courts below and render such judgment in this cause as is just and proper.

Petitioner and his attorneys of record do certify that a copy of this Application for Writ of Certiorari has been served upon the Solicitor General, Department of Justice, Washington 25, D. C., and the Honorable William Wayne Justice, United States District Attorney for the Eastern District of Texas, at his address at the Federal Building, Tyler, Texas, and Honorable Louis F. Obendorfer, Assistant Attorney General, Department of Justice, Washington, D. C., by depositing the same in a United States Post Office, with first class postage prepaid, in accordance with

the rules of this Court, on the same day that this Application has been filed in this Court.

Respectfully submitted,

JACK E. FORE, *Petitioner*

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APPENDIX "A"

IN THE
UNITED STATES DISTRICT COURT
For The Eastern District Of Texas
Marshall Division

J. P. DUNCAN, Plaintiff,
v.
SUNSET DRILLING COMPANY, ET AL., Defendants.

CIVIL ACTION NO. 940

MEMORANDUM OPINION

This suit was filed by the Plaintiff in the State District Court of Harrison County, Texas on March 6, 1963, seeking judgment against Sunset Drilling Company and Cliff W. Trice for the sum of Twenty-four Thousand Seven Hundred Sixty-seven and 28/100 ($24,767.28) Dollars, plus interest, attorneys' fees and other expenses and for foreclosure of a chattel mortgage lien upon certain cattle located in Harrison County, Texas, owned by Sunset Drilling Company, and mortgaged to the Plaintiff, J. P. Duncan, to secure Sunset Drilling Company's indebtedness in that amount. Jack E. Fore, individually, and doing business as Jack Fore Insurance Agency, and the United States of America were joined as defendants because they were asserting liens upon the cattle covered by the chattel mortgage executed by Sunset Drilling Company to the Plain-

tiff, J. P. Duncan. The United States of America properly removed this suit to the United States District Court, and after removal, R. T. Walts intervened asserting a laborer's lien upon the cattle mortgaged to the Plaintiff, J. P. Duncan.

A Receiver, W. H. Hendren, was appointed, without protest, on March 11, 1963, to take charge of and sell the cattle covered by the Plaintiff's chattel mortgage and the cattle were sold for the sum of Forty-three Thousand Nine Hundred Thirty and no/100 ($43,930.00) Dollars on March 25, 1963. The Receiver paid this sum of money into the Registry of this Court, and from said proceeds, the Court ordered the Receiver to be reimbursed for expenses in the amount of Eight Hundred Seventy-five and 58/100 ($875.58) Dollars, and to be paid a well-earned fee of Two Thousand One Hundred Ninety-six and 50/100 ($2,196.50) Dollars, leaving a balance of Forty Thousand, Eight Hundred Fifty-seven and 92/100 ($40,857.92) Dollars in the Registry of this Court to be distributed among the lien holders in accordance with legal priority.

Motions for Summary Judgment have been filed by all parties; therefore, the Court must now determine the validity and priority of the liens claimed by the Plaintiff, J. P. Duncan, the United States of America, Jack E. Fore, and R T. Walts.

The Court is of the opinion that R. T. Walts was working as a farm hand during the period of time from December 28, 1962 to March 10, 1963, and that his services were necessary and beneficial in caring for the cattle; and further, that his efforts were material in helping to preserve the chattel. Therefore, under Article 5483 of Vernons Annotated Civil Statutes of Texas, R. T. Walts is entitled to

receive pay for his services in the sum of Nine Hundred and no/100 ($900.00) Dollars, and Motion for Summary Judgment filed by R. T. Walts is sustained.

Considering next the validity and priority of the chattel mortgage held by the Plaintiff, J. P. Duncan, it is the opinion of this Court that the lien resulting from the recordation of said chattel mortgage in the office of the County Clerk of Harrison County, Texas (location of the ranches on which the cattle were ranging) on September 24, 1962, is prior to the lien of any other party herein because said lien was prior in time and prior in right to any lien asserted by any other party. *Rankin v. Scott*, Wheat 177, 179; L.Ed. 592, 593.

The Defendant and Cross-Plaintiff, United States of America, asserts a prior tax lien, pursuant to the specific provisions of 26 U.S.C.A., Section 6323, upon all property owned by Sunset Drilling Company, including the cattle sold by the Receiver in this case. The total indebtedness claimed by the Government is Thirty-three Thousand Eight Hundred Thirteen and 11/100 ($33,813.11) Dollars. All of the notices of tax liens relied upon by the Government were filed after the date and filing of J. P. Duncan's chattel mortgage. The earliest notice of a tax lien filed by the Government, in the amount of Thirty Thousand Nine Hundred Sixty-one and 92/100 ($30,961.92) Dollars, was on November 15, 1962, which was almost two months after J. P. Duncan's chattel mortgage was dated and actually filed in the chattel mortgage records of Harrison County, Texas. The Government's second notice of federal tax lien was filed in the office of the County Clerk of Harrison County, Texas on February 19, 1963.

Because the chattel mortgage lien held by J. P. Duncan is prior to the filing of the Government's notices of tax liens, the Plaintiff, J. P. Duncan, is entitled to the protection accorded by 26 U.S.C.A., Section 6323, which provides that "the lien imposed by Section 6321 (applicable in this case) shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed by the Secretary or his delegate in the office provided by law," which in Texas is the office of the County Clerk of the county where the property is situated. (Article 6644, Vernon's Revised Civil Statutes of Texas).

Therefore, the Court concludes that the Plaintiff, J. P. Duncan's lien is entitled to full satisfaction before the Government's lien. However, for the reasons hereinafter stated, the lien of the Government is a valid lien and is next in line in priority.

The Court further finds and concludes that Jack E. Fore does not have any lien on or claim to the money now on deposit in the Registry of this Court remaining from the sale of the cattle. The record in this case discloses that Jack E. Fore obtained a personal judgment in the amount of Forty-four Thousand Four Hundred Ninety-five ($44,495.00) Dollars against Sunset Drilling Company in a law suit instituted in Harris County, Texas on October 26, 1962, and filed an abstract of said judgment in the office of the County Clerk of Harrison County, Texas on November 10, 1962. In Texas, a judgment does not become a lien until the judgment has been abstracted pursuant to the express provisions of Article 5449, Vernon's Revised Civil Statutes of Texas, at which time the abstracted judgment becomes a lien upon "real estate" only. No lien against personal property is created by filing an abstract of judg-

ment. *Franke* v. *Lone Star Brewing Co.*, 42 S.W. 861 (Tex. Civ.App. 1897, error refused); *Donley v. Youngstown Sheet & Tube Co.*, 328 S.W.2d 1959, (error refused N.R.E). Jack E. Fore has not alleged any facts nor submitted any evidence showing that he holds a lien on the cattle sold by the Receiver, nor the proceeds from the sale.

In conclusion, it is the order of this Court, first, that all costs of Court be paid from the proceeds of the sale of the cattle now in the Registry of the Court; second, that the motion for summary judgment of the Intervenor, R. T. Walts, be sustained and that he receive compensation in the sum of Nine Hundred and no/100 ($900.00) Dollars for services rendered; third, that the motion for summary judgment of the Plaintiff, J. P. Duncan, be sustained as to the chattel mortgage in the sum of Twenty-four Thousand Seven Hundred Sixty-Seven and 28/100 ($24,767.28) Dollars, plus interest, attorneys' fees and funds expended by J. P. Duncan for cattle feed in the sum of Six Hundred Seventy-one and 65/100 ($671.65) Dollars; fourth, that the motion for summary judgment of the United States of America be sustained as to the balance of the funds remaining in the Registry of this Court.

The Court, having made distribution of all funds deposited in the Registry of the Court, and it being obvious that enough money does not remain to satisfy the tax lien of the United States of America, the motion for summary judgment filed by Defendant, Jack E. Fore, is overruled.

Let judgment be entered accordingly.

RENDERED and SIGNED at Jefferson, Texas, this the 30th day of October, 1963.

/s/ JOE J. FISHER
United States District Judge

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21255

JACK E. FORE, Appellant,
versus
UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

(December 4, 1964.)

Before RIVES and BROWN, Circuit Judges, and INGRAHAM, District Judge.

INGRAHAM, District Judge: This is an appeal from a summary judgment adjudicating priority of liens. The question presented is whether a federal tax lien is entitled to priority over a personal judgment which was obtained by the appellant against the taxpayer before the federal lien was recorded but which did not constitute a lien on the taxpayer's personal property and which had not been levied upon at the time of recordation.

In March, 1963, J. P. Duncan filed suit in the District Court of Harrison County, Texas, against Sunset Drilling

Company (the taxpayer) and Cliff W. Trice for the sum of $24,767.28, interest, attorneys' fees and other expenses, and for the foreclosure of a chattel mortgage upon certain cattle located in Harrison County which belonged to the taxpayer. Also named as defendants were Jack E. Fore and the United States, both of whom allegedly asserted liens upon the cattle covered by the chattel mortgage.

Jack E. Fore had obtained a personal judgment on October 26, 1962, in the District Court of Harris County, Texas, for $44,495 against Sunset Drilling Company. An abstract of this judgment was filed in the office of the County Clerk for Harrison County on November 10, 1962.

The United States had made assessments totalling $30,-961.92, notice of which was filed with the County Clerk of Harrison County on November 15, 1962. A second notice of federal tax lien, based upon different assessments, was filed on February 19, 1963.

On petition of the United States, the case was removed to the court below, and a receiver was appointed. The cattle were sold for $43,930, and after payment of the receiver's fee and expenses, there remained for distribution $40,857.92. Following removal of the suit, R. T. Walts, a farm hand for Sunset Drilling Company, filed a laborer's lien for $900 allegedly expended in feeding and caring for the cattle.

All parties filed motions for summary judgment, and the District Court held that after the payment of court costs, the proceeds should be distributed in the following order: (1) the laborer's lien of $900, (2) the claims of J. P. Duncan for $24,767.28 (plus interest), an attorney's fee of $2,476.73, and $671.65 for feed purchased for the

cattle covered by the chattel mortgage and (3) the tax liens of the United States. The court expressly held that Jack E. Fore had no lien under Texas law by virtue of his judgment, and denied his motion for summary judgment.

Pursuant to a motion filed by J. P. Duncan, R. T. Walts and the United States, the judgment was later amended to provide that Duncan's lien for attorney's fees was inferior to the tax liens of the United States but superior to all other liens, and that Walts' lien for $906 was subordinate to the chattel mortgage lien and tax liens, but superior to the claim of Jack E. Fore. The amended judgment did not affect the denial of Fore's claim.

In his appeal, Jack E. Fore does not contest the District Court's holding that J. P. Duncan and R. T. Walts were entitled to be paid ahead of him. The only issue involved in this appeal is whether the court erred in granting the tax liens of the United States priority over the claim of Jack E. Fore based upon his personal judgment in the state court.

Appellant had no lien under Texas law by virtue of his judgment. The filing and indexing of his judgment in the abstract of judgment records of Harrison County entitled him to a lien upon all of the real estate of the defendant Sunset situated in the county. It gave him no lien in the personal property of the defendant. From the record in the case he had no possessory lien, no attachment lien, no execution lien, no record lien of any kind. In fact, appellant claims no lien. He claims priority because his judgment against Sunset was rendered prior to the filing of the Government's tax lien.

Appellant's claim is based upon a literal interpretation of 26 U.S.C.A. Section 6323(a), which provides in part:

> "(a) Invalidity of lien without notice.—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—"

We do not believe appellant's claim is sound. A money judgment, unsecured by any lien, is simply an adjudication, between plaintiff and defendant, that defendant owes plaintiff $X. Such a judgment plaintiff has no rank, superior or inferior, to other claimants. His only superior position is against his judgment debtor, against whom he has litigated. The law allows him to fix or establish liens by attachment or execution, which require affirmative action by plaintiff (appellant here), which was not done in this case.

We believe that "judgment creditor" as used in Section 6323(a) means a judgment lien creditor. This is by far the predominant view. *Miller v. Bank of America*, N.T. & S.A., 166 F.2d 415 (9th Cir. 1948); *Ersa, Inc. v. Dudley*, 234 F.2d 178 (3rd Cir. 1956); *Beeghly v. Wilson*, 152 F.Supp. 726 (N.D. Iowa 1957); *United States v. Levin*, 128 F.Supp. 465 (Md. 1955); *United States v. Fisher*, 93 F.Supp. 73 (N.D. Cal. 1948). Until a lien is fixed against specific property, who knows how many judgments or claims may exist against the owner, or the order of their priority? Section 6323(a) uses the word "purchaser" along with "judgment creditor". Purchaser, so used, can be con-

sidered synonymous with grantee in a deed. In *Underwood v. United States*, 37 F.Supp. 824 (E.D. Tex. 1939), aff'd 118 F.2d 760 (5th Cir. 1941), a tax lien filed after the execution of a deed of trust but before it was recorded was held superior to the unrecorded deed. Until the competing state-created lien became choate in the federal sense, it has no protection against a recorded tax lien. This principle was clearly enunciated by the Supreme Court in *United States v. Pioneer American Ins. Co.*, 374 U.S. 84 (1963), when it stated at page 89:

> "We reject respondents' contention that the choateness rule has no place when a mortgage under Sec. 6323(a) is involved. The predecessor to Sec. 6323 was first enacted by Congress in 1912 in order to protect mortgagees, purchasers and judgment creditors against a secret lien for assessed taxes and to postpone the effectiveness of the tax lien as against these interests until the tax lien was filed. H.R.Rep. No. 1018, 62d Cong., 2d Sess. The section dealt with the federal lien only and it did not purport to affect the time at which local liens were deemed to arise or to become choate or to subordinate the tax lien to tentative, conditional or imperfect state liens. Rather, we believe Congress intended that if out of the whole spectrum of state-created liens, certain liens are to enjoy the preferred status granted by Sec. 6323, they should at least have attained the degree of perfection required of other liens and be choate for the purposes of the federal rule."

The judgment of the district court is correct and is AFFIRMED.

APPENDIX "C"

Art. 6644. FEDERAL LIEN RECORD

"The county clerk of each county is authorized to, and shall either file, or file and record, as is or may be provided by the laws of the United States, every notice, abstract or statement of any lien or claim, or release or discharge thereof, in favor of the United States or of any department or bureau thereof, when any such notice, abstract or statement prepared in conformity to the laws of the United States, is presented to him for filing or filing and recording. The county clerk shall number such notices, abstracts or statements, in the order in which they are filed, and if they are required to be recorded, he shall record them in a well-bound book to be styled "Federal Lien Record," and in either case he shall index them alphabetically under the names of the persons named therein or affected thereby, such index to be kept in a well-bound book to be styled, "Index to Federal Liens," and the county clerk shall charge a fee of One Dollar ($1) for each instrument filed or recorded. His failure to file, record or index properly any such notice, abstract or statement as herein required, or to be compensated therefor, shall not affect the validity or legality of any such lien or claim, or release or discharge thereof. Acts 1923, p. 18; Acts 1953, 53rd Leg., p. 12, ch. 7, § 1.

APPENDIX "D"

INTERNAL REVENUE CODE OF 1954
HOUSE REPORT—DETAILED DISCUSSION OF BILL

§ 6323. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors

This section corresponds to section 3672 of the 1939 Code. Subsection (b) makes it clear that the notice of lien shall be valid, notwithstanding any law of the State or Territory regarding the form or content of a notice of lien, if the notice is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (2) (2) of this section. The Treasury Department has consistently taken the position that section 3672 of the 1939 code and the corresponding provisions of prior law authorize the State or Territory only to designate the local office for the filing of the notice of the lien. Subsection (b) is designed to eliminate any question as to the validity of the lien as against mortgagees, pledgees, purchasers, and judgment creditors, where notice thereof is filed in the office designated by the law of the appropriate State or Territory, even though the notice does not comply with other requirements of the law of the State or Territory, as to the form or content of the notice. For example, the omission from the notice of lien of a description of the property subject to the lien would not affect the validity thereof, even though the law of the State or Territory requires that the notice of lien contain a description of the property subject to the lien. Subsection (b) of this section is declaratory of the existing procedure and in accordance with the long-continued practice of the Treasury Department.

Subsection (c) makes it clear that the protection of subsection (a) of this section is not extended to a mortgagee, pledgee, or purchaser who takes with notice or knowledge of the existence of the Federal lien; and that such protection is not extended to a judgment creditor who does not have a valid judgment obtained in a court of record and of competent jurisdiction or to a judgment creditor who does not have a lien which has been properly perfected under such a judgment. This subsection is not designed to extend the protection of subsection (a) of this section to categories of persons now denied protection by existing court decisions (under section 3672(a) of the 1939 code) which determine who is a mortgagee, pledgee, purchaser, or judgment creditor by reference to the realities and the facts in a given case rather than to the technical form or terminology used to designate such person. Paragraph (1) of subsection (c) provides that the lien shall be valid, without the filing of notice thereof, as against any mortgagee, pledgee or purchaser, if such mortgagee, pledgee, or purchaser had notice or knowledge of the existence of the lien at the time the mortgage, pledge, or purchase, was made. A dual requirement is set forth in paragraphs (2) and (3) of this subsection which a judgment creditor must meet to be entitled to the protection of the notice provisions of subsection (a) of this section. One requirement is that the judgment creditor must have actually obtained a valid judgment in a court of record and of competent jurisdiction for the recovery of specifically designated property or for a certain sum of money; and the other requirement is that the judgment creditor, in the case of a valid judgment for the recovery of a certain sum of money, must have a perfected lien under such

judgment on the property as to which the claims of the contesting parties relate. Furthermore, subsection (c) makes clear that particular persons shall not be treated as judgment creditors because State or Federal law artificially provides or concedes such persons rights or privileges of judgment creditors, or even designates them as such, when they have not actually obtained a judgment in the conventional sense.

Subsection (d) of this section is in all material respects the same as existing law.

Subsection (e) of this section makes it clear that the Secretary may, after a notice of lien has been filed (and such notice discloses the amount of the outstanding liability as of the time of filing), disclose the extent to which the original obligation has been reduced by subsequent payments. This is necessary for the protection of persons dealing with property subject to the lien who have a legitimate interest in determining the amount of the outstanding obligation, as well as to aid reestablishment of the taxpayer's credit.

APPENDIX "E"

INTERNAL REVENUE CODE OF 1954
SENATE REPORT—DETAILED DISCUSSION OF BILL

§ 6323. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors

This section corresponds to that of the House bill except for the deletion of subsection (c) of the House bill and conforming changes incident to such deletion.

Subsection (c) of the House bill provided certain rules with respect to the validity of the tax lien, without the filing of notice thereof, as against mortgagees, pledgees, purchasers, or judgment creditors. The applicable rules have been developed under existing law by judicial construction, and your committee deems it advisable to continue to rely upon judicial interpretation of existing law instead of attempting to prescribe specific statutory rules. The deletion of subsection (c) will continue in effect the existing law.

This section corresponds to section 3672 of the 1939 Code. As under existing law, a person who is in fact a mortgagee, pledgee, purchaser, or judgment creditor will be entitled as such to the protection of this section irrespective of the designation applied to such person under State law, for example, in a State which has adopted the Uniform Commercial Code and which uses other terms to describe such persons.

Subsection (b) of this section makes it clear that the notice of lien shall be valid, notwithstanding any law of the State or Territory regarding the form or content of a notice of lien, if the notice is in such form as would be valid if filed with the clerk of the United States district

court pursuant to subsection (a) (2) of this section. The Treasury Department has consistently taken the position that section 3672 of the 1939 Code and the corresponding provisions of prior law authorize the State or Territory only to designate the local office for the filing of the notice of the lien. Subsection (b) is designed to eliminate any question as to the validity of the lien as against mortgagees, pledgees, purchasers, and judgment creditors, where notice thereof is filed in the office designated by the law of the appropriate State or Territory, even though the notice does not comply with other requirements of the law of the State or Territory as to the form or content of the notice. For example, the omission from the notice of lien of a description of the property subject to the lien would not affect the validity thereof, even though the law of the State or Territory requires that the notice of lien contain a description of the property subject to the lien. Subsection (b) of this section is declaratory of the existing procedure and in accordance with the long-continued practice of the Treasury Department.

Subsection (c) of this section as redesignated by your committee is in all material respects the same as existing law.

Subsection (d) of this section as redesignated by your committee makes it clear that the Secretary may, after a notice of lien has been filed (and such notice discloses the amount of the outstanding liability as of the time of filing), disclose the extent to which the original obligation has been reduced by subsequent payments. This is necessary for the protection of persons dealing with property subject to the lien who have a legitimate interest in determining the amount of the outstanding obligation, as well as to aid reestablishment of the taxpayer's credit.

APPENDIX "F"

TREASURY REGULATIONS ON PROCEDURE AND ADMINISTRATION
(1954 Code)

Sec. 301.6323-1 Validity of Lien Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors.

(a) Invalidity of lien without notice—(1) Filing of notice.

* * * *

(2) Meaning of terms. (i) As used in Section 6323 and this section:

* * * *

(b) The term "judgment creditor" means a person who has obtained a valid judgment in a court of record and of competent jurisdiction for the recovery of specifically designated property or for a certain sum of money and, in the case of a judgment for the recovery of a certain sum of money, who has a perfected lien under such judgment on the property involved. The term "judgment" does not include an inchoate lien, such as an attachment lien, unless and until such lien has ripened into a judgment. *United States v. Security Trust and Savings Bank*, (1950) 340 U.S. 47. Nor does the term "judgment" include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity, such as, for example, the action of State taxing authorities. *United States v. Gilbert Associates*, (1953) 345 U.S. 361; and *United States v. City of New Britain*, (1954) 347 U.S. 81.

26 C.F.R., Sec. 301.6323-1.)

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 927

JACK E. FORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 21–25) is not officially reported. The opinion of the court of appeals (Pet. 26–30) is reported at 339 F. 2d 70.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1964. A motion for a rehearing was denied on January 21, 1965. The petition for a writ of certiorari was filed on February 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

771-302—65

QUESTION PRESENTED

Whether a federal tax lien is entitled to priority in a foreclosure proceeding over a judgment obtained before the tax lien was recorded, when the judgment did not, as a matter of State law, create a lien on the property involved in the proceeding.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

> SEC. 6321. LIEN FOR TAXES.
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.
>
> (26 U.S.C. 6321.)
>
> * * * * *
>
> SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.
>
> (a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—
>
> (1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever

the State or Territory has by law designated an office within the State or Territory for the filing of such notice; * * *

* * * * *

(26 U.S.C. 6323.)

Treasury Regulations on Procedure and Administration (1954 Code):

SEC. 301.6323–1 *Validity of lien against mortgagees, pledgees, purchasers, and judgment creditors.*

(a) *Invalidity of lien without notice*—(1) *Filing of notice.* * * *

* * * * *

(2) *Meaning of terms.* (i) As used in section 6323 and this section:

* * * * *

(*b*) The term "judgment creditor" means a person who has obtained a valid judgment in a court of record and of competent jurisdiction for the recovery of specifically designated property or for a certain sum of money and, in the case of a judgment for the recovery of a certain sum of money, who has a perfected lien under such judgment on the property involved. The term "judgment" does not include an inchoate lien, such as an attachment lien, unless and until such lien has ripened into a judgment. United States v. Security Trust and Savings Bank (1950) 340 U.S. 47. Nor does the term "judgment" include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity, such as, for example, the action of State taxing authorities. United States v. Gilbert Associates (1953) 345 U.S. 361; and United

States v. City of New Britain (1954) 347 U.S. 81.

* * * * *

(26 C.F.R. 301.6323–1.)

STATEMENT

On November 15, 1962, and February 19, 1963, the United States filed notices of tax liens in Harrison County, Texas, against the property of taxpayer, Sunset Drilling Company. (Pet. 27). On October 26, 1962, prior to the filing of either notice, petitioner Jack E. Fore had obtained a judgment in a Texas State court against taxpayer. An abstract of this judgment was filed in Harrison County on November 10, 1962, five days prior to the filing of the first tax lien. (Pet. 27). Under Texas law, the filing of an abstract of Fore's judgment gave him a lien upon taxpayer's real property in the county, but did not give him a lien upon taxpayer's personal property. (Pet. 28). Such a lien could be obtained only by attachment or execution, which Fore did not accomplish. (Pet. 29).

The present proceeding is one to foreclose a mortgage upon personal property (cattle) owned by taxpayer. The question raised in the court of appeals and in the petition is the priority in this proceeding as between Fore's judgment and the federal tax liens. The district court held the federal tax liens to be prior, since Fore had not obtained a lien but only a judgment prior to the filing of the federal liens (Pet. 24–25). The court of appeals affirmed for the same reason.

ARGUMENT

Section 6323 of the Internal Revenue Code of 1954 provides that a federal tax lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the" government in the appropriate office. Thus, when a judgment creditor obtains a perfected lien against a taxpayer's property before notice of the federal lien is filed, the judgment lien prevails over the federal lien for the reason that the federal lien, as to the judgment creditor, was not valid until *after* the judgment lien was perfected. The security interest that is first in time is entitled to priority. *United States* v. *New Britain*, 347 U.S. 81, 85. Petitioner contends that he is similarly entitled to prevail over two federal tax liens even though he obtained only a judgment, and not a lien, prior to the filing of the federal tax liens.

As the courts below found, petitioner's argument is fallacious. As its language shows, Section 6323 was enacted merely "to postpone the effectiveness of the tax lien" as against certain interests "until the tax lien was filed." *United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84, 89. The section does not change the requirement that a creditor must obtain a perfected security interest in the property in question before the federal lien is filed in order to prevail over the federal lien; it does not "subordinate the tax lien to tentative, conditional or imperfect state liens." *Ibid.* Therefore, if notice of the federal lien is filed before a judg-

ment creditor obtains a perfected state lien, the federal lien is entitled to prevail as the prior lien.

This result is reflected in the Treasury Regulations (see pp. 3-4, *supra*), and has been uniformly reached in the lower federal courts. In addition to the decisions below in this case, see *Miller* v. *Bank of America, N.T. & S.A.*, 166 F. 2d 415 (C.A. 9); *Ersa, Inc.* v. *Dudley*, 234 F. 2d 178 (C.A. 3); *United States* v. *Leventhal*, 316 F. 2d 341 (C.A. D.C.); *United States* v. *Levin*, 128 F. Supp. 465 (Md.); *Beeghly* v. *Wilson*, 152 F. Supp. 726 (N.D. Iowa); *United States* v. *Morrison* (S.D. Ohio), decided October 22, 1963 (64-1 U.S.T.C., par. 9232). These holdings are not, as petitioner suggests (Pet. 7-8, 14), in conflict with *United States* v. *Gilbert Associates*, 345 U.S. 361. That case gave content to the term "judgment creditor"; it did not suggest that a judgment creditor is entitled to prevail over a federal tax lien even though the federal lien becomes valid prior to the perfection of the judgment lien. Indeed, the Regulations cite *Gilbert Associates* in the same paragraph which states the rule that a judgment creditor must obtain a perfected lien in order to prevail over the federal lien. (See p. 3, *supra*.)

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH KOVNER,
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Attorneys.

APRIL 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965